No. 11,703

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

George B. Carey, *Appellant,* vs. Hilo Finance & Thrift Co., Ltd., a Corporation, *Appellee.*	

Upon Appeal from the Supreme Court of the Territory of Hawaii.

APPELLANT'S OPENING BRIEF.

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APPELLANT'S OPENING BRIEF.

STATEMENT OF PLEADINGS.

Plaintiff, a Hawaiian Corporation, sued defendant on eight installment promissory notes, the first being dated August 31, 1937, and the last March 8, 1938, for the aggregate installments due thereon in the sum of $4,971.84 and for interest and attorney's fees, exhibiting the notes to its declaration (Tr. 2-42).

Defendant filed a general denial (Tr. 50) and a set off and counterclaim (Tr. 50-52).

In defendant's set off and counterclaim, he claimed that on or about November, 1933, he entered into a financing agreement with plaintiff, whereby plaintiff

agreed to lend him money as he needed it on open account on certain collateral, that thereafter on April 18, 1934, defendant commenced borrowing money from plaintiff pursuant to said agreement and continued to borrow on open account under said agreement until he had borrowed the total sum of $17,973.32 for which he executed notes like those exhibited to plaintiff's declaration in the sum of $104,850.00; that each note included interest at a rate greater than 2% per month; that defendant repaid plaintiff the entire principal sum of said loans on or before December 30, 1938, by paying to plaintiff the total sum of $23,161.94 of which sum $6,188.62 was paid on usurious interest; that he had paid all money borrowed from plaintiff under the loan contract, and in addition, $6,188.62 in usurious interest. Defendant prayed judgment for $6,188.62.

Plaintiff filed a general denial to defendant's set off and counterclaim and gave notice that it would rely on the defense of illegality, payment, and statute of limitations.

FACTS SHOWING BASIS OF COURT'S JURISDICTION TO REVIEW JUDGMENT OF SUPREME COURT OF HAWAII AND STATUTE CONFERRING JURISDICTION.

The judgment for the plaintiff sought to be reviewed in the sum of $7,187.07 is final and exceeds the sum of $5,000.00 exclusive of interest and costs.

Defendant's counterclaim for $6,188.62, which was disallowed, constitutes a value in controversy which, exclusive of interest and costs, exceeds $5,000.00.

Defendant contends that his payment to plaintiff of usurious interest operated *ipso facto* under applicable statutes to discharge his notes to which plaintiff applied the proceeds of the notes sued on, except one (Tr. 31) and that therefore, the notes were without consideration. The matter is thus not *in fieri,* but completed and executed. Act 75, Session Laws of Hawaii, 1939, Section 2, enacted after the notes involved were executed, is therefore unconstitutional in operating retroactively so as to deprive defendant of the defense of the effect of usury in discharging his said notes.

Defendant contends that plaintiff's charge and collection of usury was a criminal act and void under Section 7, Revised Laws of Hawaii, 1945, and that he is entitled, for this reason, to set off such usury against plaintiff's claim. The retroactive application of Act 75, Session Laws of Hawaii, 1939, Section 2, to defendant's said defense and the retroactive effect of said Act to deprive defendant thereof is unconstitutional.

The retroactive effect of Act 75, Session Laws of Hawaii, 1939, Section 2, in depriving defendant of his defense of usury to the notes sued on is in violation of the Constitution.

This Court therefore has jurisdiction to review the judgment appealed from by virtue of Judicial Code, Section 128, amended, Title 28, U.S.C.A., Section 225.

STATEMENT OF CASE.

(The parties will be referred to as in the trial Court, that is, appellant, George B. Carey, as defendant, and appellee, Hilo Finance & Thrift Co., Ltd., as plaintiff.)

This is a suit on eight (8) promissory notes for $2,300.00 each, made Exhibits A-H to plaintiff's declaration (Tr. 22-43), dated August 31, September 28, October 29, November 17, November 30, December 31, 1937, January 31, and February 28, 1938. Other monthly notes executed by defendant for $2,300.00, beginning in March, 1938 and continuing the series, are the basis of a later suit, since they were not due when the instant suit was commenced. Other monthly notes executed by defendant beginning in April, 1934 continue to August 3, 1938 when the last of these notes was executed before August 31, 1937, when the first and oldest note sued on herein was executed (Stipulation Tr. 195-6 and Tr. 199-238).

The consideration for the notes sued on, except Exhibit D (Tr. 29-31) was the discharge *pro tanto* of preceding monthly notes (Tr. 22, 25, 28, 34, 37, 40, 43). The consideration of the note next preceding the first note sued on (Tr. 195-196) was also the discharge *pro tanto* of preceding monthly notes (Tr. 238). In fact, all or a part of the proceeds of all notes executed prior to the date of the first note sued on, except those dated August 7, 1936 and April 16, and July 30, 1937 (Tr. 221, 225, 236) were applied to prior notes (Tr. 199-238). The fact that all these monthly notes are in series together with the method

of discharging prior notes by subsequent ones show that all notes are connected in a general transaction in the nature of a running loan account. And in order to determine how this account stands between the parties, it is necessary to look beyond the notes sued on and to ascertain what actually was the prior indebtedness, if any, to which subsequent notes were applied, i.e., the consideration for these notes may and must be inquired into.

That there was to be a running loan account between the parties under a general loan agreement is made clear by their original understanding. Defendant who was in the retail sewing machine business, selling machines on conditional sales contracts, made an arrangement with plaintiff for advances to finance his business, whereby he was to assign these contracts to plaintiff in amounts two and one-half times the advances as security therefor (Tr. 117). In addition to this security, defendant hypothecated his life insurance in the sum of $10,000 (Tr. 118). After the parties agreed upon the security, it was understood between them that defendant would advance funds as defendant needed them to finance his business (Tr. 59) as long as defendant supplied the agreed security (Tr. 118-119) and this the plaintiff did over a period of approximately four years.

Plaintiff's witness, who made this arrangement between the parties (Tr. 59) testified that defendant was to borrow money as needed to finance his business (Tr. 59). This witness says, "There were to be fifteen installments on every loan * * *" (Tr. 60)

and he admits, though haltingly, that he testified in a former proceeding that plaintiff agreed to make advances to defendant over a period of time in the total sum of $67,000.00 (Tr. 75-76). This witness reminded defendant in a letter dated December 26, 1935 (Tr. 234, 5) that defendant was to borrow from plaintiff only sufficient funds to finance Hilo sales. That it was defendant's agreement to advance funds as needed for this purpose is further evidenced by plaintiff's furnishing defendant with pads of 50 or 100 notes to cover future loans to be made under the agreement (Tr. 120). Performance by the parties further evidences the agreement.

The first loan under the agreement between the parties was to be about $12,000.00 or $15,000.00 in 12 monthly borrowings (Plaintiff's witness, Tr. 72). It was, in fact, $13,885.00 in 13 borrowings as were all subsequent loans, except a few for $6,942.52. It was the practice of plaintiff in making loans to defendant under the above-mentioned lending agreement in the case of a loan of $13,885.00 spread over a period of 13 months and advanced in diminishing monthly installments beginning with $2,000.00 and ending the 13th month with $136.16 to take from defendant a series of 15 notes in the sum of $2,330.00 each, payable in monthly installments of $155.32 each, the first installment being due one month after date, each of said notes except the first being dated one month after the note preceding it. Under this arrangement, defendant received $2,000.00 the first month; $2,000.00 less $155.32 or $1,844.68 the second month, the de-

ducted $155.32 being applied to the first installment in the same amount due on the first note, defendant received $2,000.00 less two times $155.32, i.e., $310.64 or $1,689.36 the third month, the two sums of $155.32 deducted, being applied to the second monthly installment of $155.32, due on the first note and the first monthly installment of $155.32 due on the second note, and so on through the 15th note when, by calculation (see following Table A), there remained unpaid $18,638.40 of defendant's note indebtedness, defendant having received the aggregate of the agreed loan of $13,885.00 on the date of the 13th note (See following Table B).

Table A

	Note 1	Note 2	Note 3	Note 4	Note 5	Note 6	Note 7	Note 8	Note 9	Note 10	Note 11	Note 12	Note 13	Note 14	Note 15
d. Inst.	1	0													
d. ''	2	1	0												
d. ''	3	2	1	0											
d. ''	4	3	2	1	0										
d. ''	5	4	3	2	1	0									
d. ''	6	5	4	3	2	1	0								
d. ''	7	6	5	4	3	2	1	0							
d. ''	8	7	6	5	4	3	2	1	0						
d. ''	9	8	7	6	5	4	3	2	1	0					
d. ''	10	9	8	7	6	5	4	3	2	1	0				
d. ''	11	10	9	8	7	6	5	4	3	2	1	0			
d. ''	12	11	10	9	8	7	6	5	4	3	2	1	0		
d. ''	13	12	11	10	9	8	7	6	5	4	3	2	1	0	
d. ''	14	13	12	11	10	9	8	7	6	5	4	3	2	1	0
ue	1	2	3	4	5	6	7	8	9	10	11	12	13	14	15

One hundred twenty installments due on the 15 notes after execution of the 15th note.

Table B

First month	$ 2,000.00
Second	1,844.68
Third	1,689.36
Fourth	1,534.04
Fifth	1,378.72
Sixth	1,223.40
Seventh	1,068.08
Eighth	912.76
Ninth	757.44
Tenth	602.12
Eleventh	446.80
Twelfth	291.48
Thirteenth	136.16
	$13,885.04

The difference between the remaining note indebtedness of $18,638.40 after the 15th note and the cash received in the sum of $13,885.00 is $4,753.40, which represents the price or interest charged for the use of said sum of $13,885.00.

This practice is illustrated by Exhibit 1-A (Tr. 191) relating to the first note involved. It is noted that $77.66 of the proceeds was applied to defendant's pre-existing indebtedness to plaintiff. This amount is 1/15 of $1,165.00. Notes in this amount due in 15 monthly installments were sometimes (Tr. 230-236) made by defendant instead of notes for $2,330.00. Installments on such a note were due when the first note involved was executed as reflected by Exhibit 1-A. Another installment of $77.66 was paid by the second note (Tr. 194) on which the amount credited to defendant's pre-existing debt to plaintiff was $232.98 comprising $77.66 plus $155.32, the first installment due on the first note.

Defendant had the use of \$2,000.00 for the first month. He also had the use of this sum the second month plus the use of \$1,844.68, the amount he received for the second note or the use of \$3,844.68 the second month, and so on according to the following table C (see Table, Tr. 44 for loan of ½ the amount):

Table C

First month	\$ 2,000.00	for one month
Second	3,844.68	" " "
Third	5,534.04	" " "
Fourth	7,068.08	" " "
Fifth	8,446.80	" " "
Sixth	9,670.20	" " "
Seventh	10,738.28	" " "
Eighth	11,651.04	" " "
Ninth	12,408.48	" " "
Tenth	13,010.60	" " "
Eleventh	13,457.40	" " "
Twelfth	13,748.88	" " "
Thirteenth	13,885.04	" " "
Total	\$125,463.52	

Total interest at one per cent per month on the total of the above sums is \$1,254.64 (See Testimony, Plaintiff's Witness Tr. 93-96). The interest charged of \$4,753.40, as shown above exceeds the maximum legal interest of \$1,254.64 by \$3,498.76. Maximum legal interest will be conceded to be one per cent per month.

In anticipation of plaintiff's exception to the above Table C, on the ground that the figures do not include interest in advance, i. e., because the first figure of \$2,000.00, the actual amount advanced to defendant

the first month, does not have added to it maximum interest approved by the Supreme Court (Tr. 305) and as computed herein post page 36, another table is given below with such interest added to the 13 principals showing total interest of one percent on the total to be $1,475.93. This table will not enter into later calculations, since it is believed to show excessive interest. In any event, it is the most that could be charged for the actual loan of $13,885.04 and is less than the interest actually charged of $4,753.40.

First month	$ 2,354.00
Second	4,524.68
Third	6,512.04
Fourth	8,316.08
Fifth	9,937.80
Sixth	11,376.20
Seventh	12,632.28
Eighth	13,706.04
Ninth	14,596.48
Tenth	15,304.60
Eleventh	15,828.40
Twelfth	16,171.88
Thirteenth	16,332.04
Total	$147,593.52

Plaintiff through its treasurer admitted that it was charging illegal interest, as testified by defendant (Tr. 133). The treasurer did not deny the admission.

Prior to the first note sued on, dated August 31, 1937 (Tr. 20), defendant had executed 36 notes for $2,330.00 each (Tr. 191-238), representing two series of 15 notes each or two loans of $13,885.00 each, and in addition, six additional notes for $2,330.00 each, presumably on a third loan as well as two notes for

$1,165.00 each (Tr. 230-236). On the two loans represented by 30 of the 36 notes, defendant paid the sum of $6,997.52, in excess of the maximum legal interest less rebates of $2,083.66 (Tr. 191-225) or $4,913.86.

On the additional six notes for $2,330.00, he received $9,670.20 (See Table B, supra), on which the maximum legal interest, as computed in the foregoing Table C was $365.64, i. e., interest at one per cent per month on $36,563.80.

Upon execution of the sixth note, there remained unpaid 10 installments of $155.32 each on the first note, 11 on the second note, 12 on the third note, 13 on the fourth note, 14 on the fifth note and 15 on the sixth note, or 75 installments (See Table A, supra) of $155.32 each, making a total of $11,649.00. The difference between the cash in the sum of $9,670.16 received by defendant on the six notes and the balance remaining unpaid thereon of $11,649.00 is $1,978.84 which represents interest charged. This sum exceeds the maximum legal interest of $365.64 by $1,613.22, which added to the above excess of $4,913.86 makes $6,527.08. There were no rebates on these six notes.

Or, considering each of the series of 15 notes, independently, and considering the actual loan on each to be $2,000.00, payable with interest at one per cent per month in 15 months, the first installment of principal would be 1/15 of $2,000.00 or $133.32, and the first installment of interest $20.00; the second installment of principal would be $133.32 and the second installment of interest of one per cent of the principal

in the sum of $1,866.68, as reduced by payment of the first installment would be $18.67. And so on, according to the Table (Tr. 283), until the total principal of $2,000.00 was paid and a total interest of $160.01. This method of computing interest is in accordance with *Helbush v. Mitchell*, 34 Haw. 639, referred to in the Argument, post, at page 18. The interest charge of $330.00 exceeds this amount by $169.99. On 36 notes, the total excess would be $6,119.64, less the above-mentioned rebates of $2,083.66 or $4,035.98.

QUESTIONS INVOLVED

I. Has plaintiff charged usurious interest on loans to defendant prior to August 31, 1937, when the first note on which plaintiff sues was executed?

II. If plaintiff charged usurious interest, did the same apply *ipso facto* under applicable statutes to discharge defendant's indebtedness to plaintiff prior to the first note sued on, so that all notes sued on, save one (Tr. 31), were without consideration, there being no pre-existing notes to which to apply the proceeds? (See application of notes' proceeds, Tr. 22-43.)

III. If plaintiff charged usurious interest, was the interest rate in excess of two per cent per month on loans prior to May 17, 1937, and in excess of one per cent per month on loans thereafter, and thus forbidden by respective penal statute in force before and after said date?

IV. If plaintiff charged interest in violation of applicable penal statutes, was the charge void under Section 7, Revised Laws of Hawaii, 1945, so as to allow defendant on that ground to recover interest and principal paid under the charge?

V. If plaintiff charged usurious interest in violation of applicable penal statutes and the contract to collect same was void under Section 7, Revised Laws of Hawaii, 1945, did the usurious interest so paid by defendant apply *ipso facto* to discharge defendant's indebtedness to plaintiff so that there was no pre-existing indebtedness of defendant to which the proceeds of the notes sued on, save one (Tr. 31), could apply with the result that the notes were without consideration?

VI. If plaintiff charged usurious interest in excess of interest allowed by Act 75, Session Laws of Hawaii, 1939, or in excess of that allowed by prior applicable statutes, was the account between the parties such as to allow a credit to the extent of the usury on the balance due on the notes on which plaintiff sues, and should such credit be allowed?

VII. Did plaintiff charge interest on the loans represented by the notes sued on in excess of one per cent per month, the maximum allowed by penal statute, Act 222 (Chapter 232), Session Laws of Hawaii, 1937, and in excess of interest allowed by Act 75, Session Laws of Hawaii, 1939?

HOW QUESTIONS ARISE.

Defendant claims that he paid plaintiff legal interest prior to the notes sued on. He further claims that this illegal interest paid by him exceeded maximum interest allowed by Act 75 (Chapter 223-A), Session Laws of Hawaii, 1939, and that therefore, he is not deprived of the defense of usury by Section 6782X of said Act. Hence it is necessary, at the outset, to determine the existence of usury and the extent thereof.

Upon the finding that defendant paid interest in excess of that allowed by Act 75, supra, the effect of such payment on plaintiff's claim must be determined. This determination may be approached in two ways: (1) By limiting defendant's liability to pay principal without interest of loans made before first note sued on and regarding the principal as paid, so that in the case of all the notes sued on (Tr. 22-43), except one (Tr. 31), their proceeds were applied to pre-existing notes which had been paid by the application thereto of said excess interest; (2) By setting off the excess interest against plaintiff's claim.

Defendant further claims that plaintiff's contract for usurious interest on all notes, including those sued on, was in violation of a penal statute and therefore void under Section 7, Revised Laws of Hawaii, 1945, and that for this reason, he may recover both the principal and the interest, and that the notes sued on are void. It is necessary, therefore, to determine whether interest charged by plaintiff was such as was prohibited by penal statute.

SPECIFICATION OF ERRORS.

No. 1.

The Supreme Court of the Territory of Hawaii, hereinafter referred to as the "Court", erred in making and entering its judgments on the 30th day of April, 1947, and on the 1st day of May, 1947, in the above entitled Court and cause.

No. 2.

The Court erred in holding that appellant's continuous borrowing from appellee and his continuous paying to appellee of sums borowed with interest from April, 1934 to April, 1938 did not constitute an open or running account between the parties or an analogous transaction governed by the law applicable to open or running accounts.

No. 3.

The Court erred in holding that the 46 notes executed by the appellant between April, 1934 and April, 1938 and payable to appellee, including the eight notes sued on, did not evidence and constitute an open or running account between the parties or an analogous transaction between the parties governed by the law applicable to open or running accounts.

No. 4.

The Court erred in holding that the transaction between the parties as evidenced by the 46 notes executed by appellant between April, 1934 and April, 1938, and payable to appellee and as further evidenced

by the method of paying the first 38 of said notes was not violative of the statutes pertaining to usury.

No. 5.

The Court erred in calculating the interest paid by appellant on sums borrowed from appellee prior to the execution of the notes sued on and in failing to find that appellant had paid interest in excess of that allowed by law and in failing to apply said excess to the notes sued on.

No. 6.

The Court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize appellee to charge interest in excess of 15% of the amount advanced to appellant for 15 months.

No. 7.

The Court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize appellee to charge as interest 15% of the total of the amount actually advanced to appellant for 15 months plus an amount in excess of 15% thereof and to impose on appellant an obligation to pay the amount actually advanced plus 15% of said total sum and to deduct in advance the amount over and above the amount actually advanced, that is to say, the Court erred in holding that appellee was authorized to charge interest of 15% of the total of $2,000.00 plus 15% of $2,000.00, i. e., $300.00 plus

$30.00—a total of $330.00, the allowable interest as computed by the Court being $349.50.

No. 8.

The Court erred in construing Act 154, Session Laws of Hawaii, 1933, and Act 231, Session Laws of Hawaii, 1937, so as to authorize money lenders operating thereunder to add to the amount actually advanced to the borrower for 15 months an additional sum not in excess of the total of 15% thereof plus 15% of the amount advanced. That is to say, the Court erred in construing said acts so as to authorize said money lenders to impose an obligation on borrowers in the case of a $2,000.00 advance for 15 months to pay $2,000.00 plus $352.94, 15% of $2,352.94, being $352.94, and to deduct $352.94 in advance.

No. 9.

The Court erred in holding that no one of the 46 notes involved and no combination thereof is usurious or violative of the statutes pertaining to usury.

No. 10.

The Court erred in holding that the case of *Helbush v. Mitchell,* 34 Haw. 639, was not applicable to the instant case.

No. 11.

The Court erred in pretermitting the material constitutional question raised by the appellant herein that the interest charged on the transactions involved was in excess of one per cent per month, computed

upon the money actually received by the borrower for the whole period of the loan or for the period of time he actually had the use of the money, that the taking of such excessive interest was a criminal offense, both under the general usury law and under the statute regulating money lender, that Section 7 of the Revised Laws of Hawaii, 1945, provides that transactions in contravention of a prohibitory law are void and the transaction being within that class is void; that it was beyond the constitutional power of the Legislature to create an agreement between these parties so declared void by subsequent enactment of law purporting to validate transaction.

No. 12.

The Court erred in rendering judgment for the appellee on its amended complaint and on appellant's set off and counterclaim.

ARGUMENT.

APPLICATION OF CASE OF HELBUSH v. MITCHELL TO LOAN ACCOUNT INVOLVED.

In the case of *Helbush v. Mitchell,* 34 Haw. 639, a note like the ones involved herein and the law applicable thereto were considered. In this case, the action was to recover the balance due on an installment promissory note in the amount of $2,350.00 payable in 40 semimonthly installments of $58.75 each without provision for interest until after maturity. The consideration for the note was a loan of $1,880.00.

The balance of the principal of note represented interest in the sum of $470.00.

At the time of the execution of this note, Section 7064, Revised Laws of Hawaii, 1935, was in force. This section, quoted in the foot-note to the opinion in the *Helbush* case at page 641, reads as follows:

> Every person, co-partnership or corporation under the provisions of this Act shall have power: (a) To loan money on personal security, or otherwise, and to deduct interest therefor in advance at the rate of one percent per month, or less and, in addition, may receive and require uniform weekly or monthly installments.

Also in force at the time of the execution of this note was Section 7053, Revised Laws of Hawaii, 1935, which reads as follows:

> If a greater rate of interest than one percentum per month shall be contracted for, the contract shall not, by reason thereof, be void. But if in any action on such contract proof be made that a greater rate of interest than one per centum per month has been directly or indirectly contracted for, the plaintiff shall only recover the principal and the defendant shall recover costs. If interest shall have been paid, judgment shall be for the principal less the amount of interest paid; provided, however, that this section shall not be held to apply to contracts for money lent upon bottomry bonds or upon other maritime risks nor to loans made under the provisions of Chapter 170.

The Court held that Section 7064, supra, did not apply because it neither prescribed nor limited the rate of interest except where interest is deducted in advance and because interest was not deducted in advance but was computed and added to the amount of the loan, and further, that Section 7053, supra, was applicable.

The Court further held that interest could be computed only upon the loan in the amount of $1,880.00, that is, only upon the actual amount due for the actual period during which interest should run, and that Section 7064, supra, even if applicable, did not allow interest on installments.

The Court applying Section 7053, supra, computed interest as follows: The note, in the amount of $2,350.00 was dated May 18, 1935. The first of the 40 installments was due May 30. The actual loan was $1,880.00. On May 30, 1/40 of the principal was due, i.e., $47.00 plus interest at one per cent per month on $1,880.00 for twelve days, i.e., $72,774.00. On June 15, 1935, the due date of the second installment, the sum of $47.00 was again due, plus interest of one per cent per month on the principal of $1,880.00 less the paid first installment of $47.00, i.e., $9.46, and so on until the total principal of $1,880.00 is paid, plus the total interest of $189.39. The Court accordingly held that the interest charged of $470.00 exceeded the maximum lawful interest by $280.61; that under Section 7053, supra, the note in so far as it related to interest was void, and that all interest paid thereon was to be ap-

plied to reduce the principal of $1,880.00. It follows that, if the note in the sum of $2,350.00 had been paid in full, the payee would have held the sum of $470.00 for the use and benefit of the maker, since this sum would have been paid on a void contract.

Section 7064, Revised Laws of Hawaii, 1935, which is Act 154, Session Laws of Hawaii, 1933, was in force when the first 38 of the notes herein involved were executed. The section was not materially amended by Act 231, Session Laws of Hawaii, 1937. (See opinion of Supreme Court (Tr. 303), Section 7053, Revised Laws of Hawaii, 1935, was in force when all the notes were executed.

It has been demonstrated that defendant received $13,885.04 for his original 15 notes and owed the sum $18,638.40 thereon after the 15th note. Interest therefore was $4,753.36, and in excess of one per cent per month as shown above, page 9. If the loan on a series of 15 notes is regarded as being $13,885.00, as defendant contends, it will be conceded that all such loans, as were made, were paid. Under Section 7053, Revised Laws of Hawaii, 1935, as applied in the *Helbush* case, plaintiff was only entitled to recover principal.

The proceeds aggregating $14,000.00 of seven of the eight notes sued on were applied by plaintiff to defendant's pre-existing indebtedness to defendant. Action thereon is, in substance, an action on such pre-existing indebtedness. But this indebtedness, consisting of the principal of the loan or loans, was paid, and, since plaintiff was only entitled to recover prin-

cipal, he cannot recover on the seven notes. Plaintiff can only recover the balance claimed of $621.48 on the 8th note (Tr. 31).

> An alleged indebtedness or liability which does not in fact exist or which is not a binding and legally enforceable obligation of the obligor cannot ordinarily constitute a consideration for a bill or not. 10 C J. S, Bills and Notes, Section 150.

DEFENDANT CLAIMS REFUND OF EXCESS INTEREST BECAUSE CONTRACT THEREFOR VOID.

Defendant's claim to such excess interest as he paid or to a credit therefor is not a claim to recover usury or in the nature of such a claim. Plaintiff contracted for and collected $330.00 interest on a loan of $2,000.00 for 15 months, which was reduced monthly by payments thereon of $133.32 and on which interest at one per cent per month for 15 months amounts to $160.01, as calculated above according to the case of *Helbush v. Mitchell, supra.* Plaintiff's charge and receipt of $330.00 are in excess of two per cent per month, which would be $320.02 and are a violation of the applicable criminal usury statute, Act 72, Sessions Laws of Hawaii, 1933, fixing the maximum interest rate of two per cent per month and Chapter 232, Session Laws of Hawaii, 1937 (post) fixing the maximum rate at one per cent per month. Chapter 232, supra, fixing the maximum interest rate at one per cent per month became effective May 17, 1937, and affects all notes beginning with the note of May 28, 1937.

It was shown above that plaintiff charged interest of $4,753.40 on an installment loan of $13,885.04 less rebates in the sum of $2,083.66 (Tr. 191-225) or $2,669.74, which is in excess of twice interest at one per cent per month computed above, page 9, as $1,254.64 and is therefore in excess of two per cent per month and violative of said Act 72, supra.

At the time of these interest charges, plaintiff was qualified as a money lender under Act 154, Session Laws of Hawaii, 1933, which prohibited and penalized the charging of interest by licensees in excess of one per cent per month.

Plaintiff's contract being for interest in excess of two per cent per month and prohibited was void under Section 7, Revised Laws of Hawaii, 1945. (See 66 C. J., Usury, Section 180, 184, 232). Defendant is entitled to recover the total amount in the sum of $26,890.12 paid on all the notes (Tr. 232) or is entitled to credit therefor as for money had and received, Chapter 223-A, Session Laws of Hawaii, 1939, Section 6782X, purporting to deprive victims of usury of the defense of usury is inapplicable.

LOAN ACCOUNT INVOLVED WAS RUNNING MUTUAL ACCOUNT GOVERNED AS TO LIMITATION OF ACTION BY SECTION 10422, REVISED LAWS OF HAWAII, 1945.

All pertinent evidence demonstrates, as shown in the statement of case, that the parties originally entered into a lending agreement which they performed. There is no evidence tending to disprove such agree-

ment. That the parties contemplated continuous loans is clear. The form and amount of security therefor was agreed upon (Tr. 117). The amount of the loans was to be determined by defendant's requirements for his Hilo Branch (Tr. 59), and was sufficiently definite under the circumstances. Plaintiff's witness says (Tr. 59), "The arrangement was that Mr. Carey (defendant) should borrow a subsequent sum a month with interest deducted which would give him the cash that he needed to finance his business in Hilo." Plaintiff's witness, who made the arrangement between the parties, and on their behalf, was auditor for both parties (Tr. 59) and for the defendant from 1932 to 1939 (Tr. 56). He was familiar with defendant's business and its financial requirements. He says he was familiar with the details of the agreement (Tr. 62). He prepared a financial statement of defendant's business (Tr. 73). He states that loans for the Discount Corporation, which defendant had formerly patronized were only small accounts (Tr. 73). He further states that defendant presented a budget providing for so much per month (Tr. 76). The parties, therefore, had ascertained with sufficient certainty the amounts defendant would require when they entered the agreement. In any case, by construction and performance of the agreement, the parties rendered it certain, since the loans were continuous and uniform with minor exceptions and interest was the same on all loans. (See 17 C. J. S. Contracts, Section 36-C, page 367).

The transactions between the parties have all the ear marks of an open running mutual account. They

were continuous, consisting of reciprocal dealings between the parties. Inspection of tables, Exhibit 1-A to 38-A (Tr. 191-238) and A1-H1 (Tr. 22-43) shows that after executing the first note on April 10, 1934 (Tr. 189), defendant was never out of debt to plaintiff; that he never received the principal of the notes except four (Tr. 31, 221, 230, 236); that the proceeds of all notes with the exceptions noted were applied to preceding notes; that in the cases of the excepted notes on which defendant received the principal, there were installments on preceding notes to become due after date of said notes. The notes were therefore component and connected parts of one continuing transaction.

The importance of an original lending agreement between the parties is that it would more clearly characterize the continuous loans as an open running mutual account, but it is not essential to such an account *(Trust Company v. Doe,* 146 P. 692, 26 Cal. App. 246).

It follows therefore under the applicable Statute of Limitation, Section 10422, Revised Laws of Hawaii, 1945, that the limitation began to run on defendant's set off and counter-claim for money had and received under a void contract on the date of defendant's last payment on December 31, 1938 (Tr. 43). The set off was filed in June, 1944. The statutory period is six years (Section 10421, Revised Laws of Hawaii, 1945).

The Supreme Court commented (Tr. 300-301) that this arrangement between the parties was without legal effect, but its comment is without basis in the

record and is *obiter*. The Court found that interest charges on notes prior to the ones sued on were unlawful. Hence, it was unnecessary to determine whether the nature of the account between the parties was such as to permit the setting off of prior excess interest against plaintiff's claim.

So far as the application of interest to the principal as a defense for the purpose of defeating recovery is concerned, the Statute of Limitation does not apply (66 C. J., Usury, Section 282).

ACTUAL TRANSACTION BETWEEN PARTIES.

Plaintiff's witness testified, as pointed out above, that the first loan in April, 1934, was to be about \$12,000.00 or \$15,000.00 in 12 monthly borrowings (Tr. 72). He must have calculated the total of the amounts actually received by defendant as shown by Table B, supra, page 9, i.e., \$2,000.00, the first month; \$1,844.68 the second month, and so on aggregating around \$14,000.00 Otherwise, the amount and number of borrowings could not have been arrived at. The loan was in fact \$13,885.04 in 13 borrowings as were all the other loans except two (Tr. 230-236).

Plaintiff's witness testified (Tr. 83-4) that in the case of a series of 15 notes for \$1,165.00 each, defendant would receive \$1,000.00 the first month; \$922.34 the second month, and so on in twice the sums stated in Table B, supra, which related to a loan of twice \$1,165.00 or \$2,330.00.

The same witness points out (Tr. 93-94) that in the case of a series of 15 notes for $1,165.00 each, defendant had the equivalent of use of $62,731.76 for one month. (See Table C, supra, page 9).

The actual transaction between the parties would not have been different if defendant had proposed to borrow and plaintiff had agreed to lend the sum of $13,885.04 in installments as it was actually advanced at maximum legal interest. It may be assumed that plaintiff would nevertheless have made the same requirement of 15 monthly notes for $2,330.00 each, but the requirement in such a case would be more clearly a device to extort usury.

Suppose the first note was not due in installments and that defendant had not chosen to pay any part of it and had chosen to borrow only the sum which he actually received, that is $1,844.68, and had given his note for this sum plus interest. Plaintiff would have the first note for $2,000.00 plus interest on which he advanced $2,000.00 and the second note for $1,844.68 plus interest on which he advanced $1,844.68. And suppose defendant exercised the same choice the third month, paid nothing on the first or second notes, borrowed only what he actually received, that is $1,689.36, according to Table B, supra, page 8, and gave his note for this sum plus interest, and so on through the 13th month.

Maximum legal interest as inferentially approved by the Supreme Court would be $354.00 (see post, page 36) on the first loan of $2,000.00, 15 per cent

of $2,354.00 being $354.00, and $325.53 on the second loan of $1,844.68, and so on according to the following Table "D":

$ 2,000.00	$ 354.00
1,844.68	325.53
1,689.36	298.14
1,534.04	270.73
1,378.72	243.30
1,223.40	215.89
1,068.08	188.48
912.76	161.07
757.44	133.66
602.12	106.25
446.80	91.78
291.48	51.43
136.16	24.02
$13,885.04	$2,464.28

Maximum interest on the amount actually received is $2,464.28, which is also the maximum interest allowed by Chapter 232, Session Laws of Hawaii, 1939. And since the interest charged by plaintiff exceeds this maximum said Act by its terms (Section 6782X) does not deprive defendant of his defense of usury. The amount of interest actually charged for a total loan of $13,885.04 was $4,753.40, supra, less rebates of $2,083.66 or $2,669.74, page 10, which exceeds maximum interest of $2,464.28 by $205.46. Plaintiff, through its treasurer, admitted to defendant that plaintiff was charging illegal interest (Tr. 133). The treasurer did not deny the admission.

The device of the 15 monthly notes was only calculated to increase the interest on the loan. Plaintiff's witness says (Tr. 180) that there was no agreement for defendant to borrow every month and that, if he chose to borrow, he could apply the proceeds as he pleased, meaning that defendant chose to receive $1,844.68 on the second note and to let plaintiff apply the remaining $155.32 of the principal to the first note. But the plaintiff knew or soon came to know that defendant would borrow every month, if not by compulsion of an agreement by the greater compulsion of necessity. Defendant needed money monthly to operate his Hilo business (Tr. 118). It was plaintiff who was under an agreement to lend monthly upon defendant's furnishing the agreed collateral (Tr. 118). When defendant executed the 10th note of a series of 15 notes, 9 installments aggregating $1,395.00 were due on preceding notes, prior installments thereon having been paid by credits. Defendant's testimony (Tr. 139) is undisputed that he was unable to pay sums around $2,000.00 a month to defendant; that if he had had collateral contracts, he would never have stopped borrowing because he did not have finances to make payments instead of renewing his notes.

After repeated transactions of the same kind over a period of four years, the parties knew that defendant would receive diminishing balances on his monthly loans because of increasing credits to prior notes and they knew the amounts of these balances. They knew also that defendant could not pay pre-existing notes

in cash and therefore that he had to make new notes. The aggregate principal of the 46 notes involved is $90,000.00, of which by computation $68,618.98 was applied to pre-existing notes. See Appendix I, for a picture of plaintiff's web in which defendant became enmeshed.

Defendant was caught in this web when he executed the first series of 15 notes and became obligated thereby to pay $18,638.40 for an advance of $13,885.04 (see supra, page 7). It was the application of the proceeds of the first series of notes to installments due thereon and the consequent reduction of the amounts received thereon by defendant which was the catalyst of the excessive interest. Defendant owed plaintiff a note indebtedness of $18,638.40 after the 15th note for cash received of $13,885.04, defendant's indebtedness embracing usurious interest (supra, page 9). Subsequent notes to pay, defer or renew this indebtedness were infected with usury to the same extent (66 C. J., Usury, Section 203). Upon payment of this indebtedness, the new loan or loans paid, as was the first, were likewise infected with the same element of usury.

The Supreme Court failed to see through the maze of notes, installments, and credits to the real transaction between the parties. In this connection, the text of 27 R. C. L., Usury, at page 211, is apposite. It reads as follows:

> "*Devices to Conceal Usury*—The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise

whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered."

Whatever the method of computing interest and whatever the rate, the basic figure is the amount the borrower had the use of. There is no gainsaying that in the case of a transaction between the parties involving 15 notes for $2,330.00 each, the total amount received by defendant was $13,885.04, and that it is only on this amount that interest may be computed.

OPINION OF SUPREME COURT.

In *Helbush v. Mitchell,* supra, the Supreme Court in considering the applicability of Section 7064, Revised Laws of Hawaii, 1935, quoted above page 18 to the note therein involved held that the lender had not deducted interest in advance, but had computed and added it to the principal. The Court held therefore that the provision in said Act for interest of one per cent per month where interest is deducted in advance was not applicable and applied, Section 7053, Revised Laws of Hawaii, 1935, quoted above at page 19. The note was for $2,350.00 due in 40 installments

of $58.75 each, principal being $1,880.00 and interest $470.00.

In the instant case, the notes are for $2,330.00 each, due in installments of $155.32 each, principal being $2,000.00 and interest $330.00. Interest was not deducted in advance if it was not deducted in advance in the *Helbush* case; it was computed in advance and added to the principal, if this was done in the *Helbush* case. For in both cases, interest was computed and added in advance or deducted in advance in exactly the same way. It would seem therefore, that the provision for interest in Section 7064 would not apply in the instant case and that Section 7053 would apply as in the *Helbush* case.

Th Court in the instant case says correctly that the Court in the *Helbush* case applied Section 7053, supra, and found the charge of interest to be usurious because the Court found that the lender did not deduct interest in advance, but required the indebtedness with interest to be paid in installments exactly as in the instant case. The Court in the instant case then distinguished the *Helbush* case because in that case, interest was not deducted in advance, and because in the instant case, interest was deducted in advance. The Court's ratiocination is difficult, if not impossible, to follow. Presumably, the Court would have followed the *Helbush* case, if it had found that interest on the notes involved was not deducted in advance.

The Court calls attention (Tr. 304) to the stipulation of the parties that interest was "deducted in

advance." But the employment in the stipulation of the uncertain expression, "deducted in advance" does not determine or change the facts. What was done is clear. If the stipulation does not correctly describe what was done, the facts are to be considered not what was stipulated for the facts. The actual transaction with respect to interest is easier to understand than to describe in a word. See Chapter 223-A, Session Laws of Hawaii, 1939, Section 6782A(9) which reads, "Where interest * * * (is) paid in advance, deducted in advance, collected in advance, received in advance, or charged in advance * * *". These several descriptions do not mean that there may be as many different interest transactions, but simply that the legislature was making sure that at least one of the descriptions would fit the actual and invariable transaction.

In any event, the Supreme Court does not overrule the *Helbush* case and distinguishes it only from the instant case. The *Helbush* case continues, therefore, to be determinative of defendant's claim that all notes prior to the ones sued on were infected with usury as heretofore pointed out, and that under the *Helbush* case and its construction of Section 7053, Revised Laws of Hawaii, 1935, the usurious interest was applied to cancel the balance due on the notes sued on.

Under the *Helbush* case, interest on a loan of \$2,000.00 payable in 15 equal installments would be calculated, as indicated in the table (Tr. 283), that is, the principal of \$2,000.00 would be payable in 15 installments of \$133.32 each, and the interest of one per cent per month would be payable on diminishing bal-

ances of principal for the time the borrower had the use of such balances. The Court did not apply Section 7064, Revised Laws of Hawaii, 1935, supra, page 19, applying instead Section 7053, Revised Laws of Hawaii, 1935, supra, page 19 under the general rule that interest is to be computed on the actual amount due *(Helbush v. Mitchell,* 34 Haw. 639-45).

The Court in the instant case applied Section 7064, supra. The effect of this statute by the most liberal construction is to dispense with the general rule invoked in the *Helbush* case by which interest is computed on the amount due and to allow money lenders interest in advance on loans payable in installments. In this way, the lender receives interest as if the borrower had the use of the whole principal for the period of the installments, although the borrower reduces the principal each month. "Interest therefor" in the statute must mean interest on the loan. The loan in this case is $2,000.00. Interest thereon at one per cent per month for 15 months is fifteen per cent of $2,000.00 or $300.00 for the use of the principal for the period of 15 months. The statute could hardly be stretched further than to allow this interest despite monthly reductions in principal. But the Court in the instant case says (Tr. 302) with reference to the statute "* * * This plain and unambiguous grant of power speaks for itself * * *" and says in effect (Tr. 304-305) that interest is not to be figured on the loan of $2,000.00, but on the total of $2,000.00 plus an unknown figure which can be arrived at only through algebraic process and that if fifteen per cent of this

total does not exceed the figure arrived at, the figure is interest allowed by the statute.

In the instant case, the sum of $330.00, which plaintiff added to the $2,000.00 loan, was picked out of thin air. It does not purport to be interest, although it serves an illegitimate factor in the computation of interest, i.e., fifteen per cent of $2,330.00 is $349.00, which the Court finds to be maximum legal interest (Tr. 305) where the factor in the computation is said figure of $330.00. A different factor would, of course, make a different amount of interest.

The Court's approval of interest of $349.00 on a $2,000.00 loan due in 15 installments (Tr. 305) because fifteen per cent of the total of $2,000.00 plus the sum of $330.00, which was arbitrarily adopted and added, is $349.00, is no less arbitrary than the addition of the sum of $330.00. Certainly Section 7064, Revised Laws of Hawaii, 1933, on which the Court relies, does not contemplate the calculation of interest by missing numbers.

Suppose a borrower attempted to figure maximum interest which he would have to pay for a loan of $2,000.00 due in 15 equal monthly installments under Section 7064, supra, as construed and applied by the Supreme Court. In the first place, he would have to be versed in algebra, for he would have to begin with the unknown quantity which he was trying to ascertain. For instance, let X equal the interest he would have to pay. Now the Supreme Court has said that interest is legal under the statute if fifteen per cent of the total of the interest plus the principal is equal

to the interest. Accordingly, fifteen per cent (2,000 + X) equals X, i.e., 300 + 15% of X = X. The borrower here would have to know something about transposing. 85% of X = 300. Maybe, he could figure this out. 1% of X = 3.53. 100% of X = $353.00 Q.E.D. Section 7064, Revised Laws of Hawaii, 1933, does not contemplate such calculation of interest.

If interest is to be computed in advance on the actual loan and added thereto to form the principal, and interest is computed on this principal, it would be fifteen per cent of $2,000.00 plus $300.00, $2,300.00 or $345.00. Interest charged in advance on unearned interest will not be allowed in the absence of the clearest statutory authorization. But without such authorization, the Supreme Court would allow interest in excess of $345.00, i.e., $349.00, which shows the Court's confusion.

The provision in Section 7064, Revised Laws of Hawaii, 1935, relating to interest was not changed by Chapter 223-A, Session Laws of Hawaii, 1937 (Opinion Tr. 303).

This Court will not adopt the Supreme Court's construing of a local statute to be black, if the statute is white, although it might feel constrained to adopt a brown construction of such a statute.

The Supreme Court construed said Section 7064 to provide the same interest as is expressly provided by Act 223-A, Session Laws of Hawaii (1939), enacted six years later. Act 223-A, Section 6782A(9) 6782A(A) and 6782L(a) provides for interest on the face of the note. What relation, if any, the face of

the note bears to the amount actually received by the borrower is not defined. For all that appears, the face of the note may be thrice the amount borrowed. Under such a statute, it would be proper to allow fifteen per cent interest on the face of the notes involved herein, i.e., $2,300.00 as the Supreme Court did, but without the authorization of said (Act 223-A, or of any other Act).

The trial Court said (Tr. 285) that under Act 75 (Chapter 223-A) Session Laws of Hawaii, 1939, it would have been lawful for plaintiff to charge interest in the sum of $349.50. The Supreme Court expressly approved this charge, but without the authorization of said Act 75, which became law after the notes sued on were executed.

The Supreme Court holds (Tr. 303) that Section 7064, Revised Laws of Hawaii, 1935 (Act 54, Session Laws of Hawaii, 1933) was not changed by Act 75 (Chapter 223-A) Session Laws of Hawaii, 1939. Nothing comparable to Section 9 (a) (b) of the latter Act appears in the former. This section expressly allows, *inter alia,* interest on the amount actually received by the borrower to be added to such amount to make the principal and allows, in addition, interest on this principal.

The section cannot be construed to allow the lender to charge interest on the loan, add it to the loan and charge interest on the total, as is expressly allowed by Chapter 223-A, Session Laws of Hawaii, 1939, Section 6782A(9)(B) enacted after the last note involved was executed. The section cannot be construed

to allow the lender arbitrarily to add an amount to the loan, as plaintiff herein added $330.00, and to charge interest on the total. The section can only be construed to allow interest on installment loans despite diminishing balances.

NOTES SUED ON ARE VOID.

It has been demonstrated that the maximum interest allowable under the Supreme Court's construction of Act 75, Session Laws of Hawaii, 1939, on the original loan to defendant of $13,885.04 advanced in installments was $2,464.28, ante page 28, and that plaintiff charged interest on said loan in the sum of $4,753.40, ante page 10, less rebates of $2,083.66 (Tr. 191-225) or $2,669.74, which exceeded maximum interest by $205.46. Notes representing the loan and given in payment thereof included the same excessive interest. The proceeds of seven of the notes, on which plaintiff sues, were applied to pre-existing notes which were infected with the same usury as the loan or notes which they paid. Therefore, the notes sued on are infected with usury to the same extent (66 C.J., Usury, Section 203). The making of the loan and the taking of the notes therefor by the plaintiff prior to the notes sued on was an illegal and prohibited Act under Acts 72 and 154, Session Laws of Hawaii, 1933, because of the usury. The notes are not enforceable for this reason and for the further reason that under Section 7, Revised Laws of Hawaii, 1945, the notes are void. They cannot, therefore, constitute consideration for

seven of the notes sued on (10 C.J.S., Bills and Notes, Section 150). These latter notes are, for this reason, not collectible and for the further reason that they, like the former ones, are infected with usury in violation of the aforesaid Acts and are not enforceable and void under said Section 7, Revised Laws of Hawaii, 1945. Plaintiff would accordingly be entitled to recover only the balance of $621.48 due on note made Exhibit to the declaration (Tr. 31).

PARTIAL FAILURE OF CONSIDERATION AND INDEFINITENESS OF CONSIDERATION RENDER SEVEN OF NOTES SUED ON UNENFORCEABLE.

If the Court holds that plaintiff was entitled to charge $300.00 interest, i.e., interest at one per cent per month for 15 months on a loan of $2,000.00, and that plaintiff's charge of $330.00 was $30.00 in excess of allowable interest, it would follow that plaintiff could not recover the total of these $30.00 excesses on each note accumulating prior to the notes sued on. It appears from the record that the proceeds in the sum of $14,000.00 of seven of the notes sued on were credited to defendant's pre-existing indebtedness, that is, the consideration of these notes was payment of defendant's said indebtedness. But this indebtedness was less than plaintiff took it to be, if it embraced excessive and uncollectible interest. The presumption of consideration for said note is thus rebutted, and the burden is shifted to plaintiff to show what the consideration was 11 C.J.S., Bills and Notes, Section

155, page 80. It is impossible to demonstrate from the record what defendant's actual indebtedness was prior to the first note sued on, payment of which constituted consideration for seven of the notes sued on. Plaintiff, therefore, cannot recover on said notes and may recover only on the eighth on which he claims $621.48 (Tr. 31).

CONCLUSION.

1.

Plaintiff charged interest in excess of that allowed by Act 75, Session Laws of Hawaii, 1939. Accordingly, Section 6782X of this Act preserves defendant's defense of usury provided by Section 7053, Revised Laws of Hawaii, 1935, under which plaintiff was entitled to recover only principal of loans without interest. Principals were paid prior to the notes sued on. Defendant therefore owed no pre-existing indebtedness, payment of which constituted consideration for seven of the notes sued on.

2.

Defendant's notes prior to notes sued on were void by the combined effect of penal statutes prohibiting the usury which tainted them and Section 7, Revised Laws of Hawaii, 1945. For the same reason the notes sued on are void or, in any case, not collectible since their consideration was payment of the preceding void notes.

3.

Because defendant paid principal and interest on void contracts, he is entitled to recover the whole amount paid.

4.

The Supreme Court's allowance of interest of $330.00 on a loan of $2,000.00 for 15 months was palpable error, at least, to the extent of $30.00, since maximum interest would be $300.00. Defendant's actual indebtedness, if any, prior to execution of the notes sued on was less than that to which plaintiff applied the proceeds of seven of the notes sued on. The consideration for said notes, therefore, fails in part and in part it is indefinite. Since upon this showing the burden is on plaintiff to show the amount of defendant's indebtedness to him to which it applied the proceeds of said notes, plaintiff cannot recover on said notes.

5.

The Supreme Court was clearly in error in its computation and allowance of interest, particularly in construing Act 154, Session Laws of Hawaii, 1933, as allowing the same extent of interest as Act 75, Session Laws of Hawaii, 1939. It is, therefore, necessary to reverse the case for a determination, among other things, of the effect of the usury collected by plaintiff on defendant's obligation to plaintiff. Defendant's obligation is less than claimed by plaintiff and to the extent that it is less, the amount of recovery on seven notes would be reduced, since the proceeds

of these notes were applied to defendant's said obligation.

*   *   *   *   *   *   *

It is felt that the Court will wish more light on this case than is afforded by the foregoing brief. Accordingly, a brief on behalf of defendant prepared by eminent counsel for the Supreme Court is added as Appendix II.

It is respectfully submitted that plaintiff cannot recover (that defendant should recover on his counterclaim) all principal and interest paid by him to defendant.

Dated, Honolulu, T. H.,
March 20, 1948.

BRAHAN HOUSTON,
Attorney for Appellant.

(Appendices I and II Follow.)

Appendices I and II.

Realty Investment Co. & [illegible] and [illegible] Co., Ltd. — Detail of All Transactions on Loans.

Due Date	Note No.	Face Value of Notes	Interest Deducted	Cash Received	Additional Cash Paid on other Note	Cash Paid on Notes to Custer
21	1	$1,165 -	$165 -	$1000 -		
[illegible]	2	1,165 -	165 -	[illegible]		$77 66
20	3	1,165 -	165 -	[illegible]		155 32
20	4	1,165 -	165 -	767 02		232 98
20	5	1,165 -	165 -	689 36		310 64
20	1	2,330 -	330 -	1611 70		388 30
20	6165	2,330 -	330 -	1465 18		534 82
[illegible]	6962	2,330 -	330 -	1300 06		699 94
16	7009	2,330 -	330 -	1145 70		854 30
9	7118	2,330 -	330 -	990 [illegible]		[illegible]
18	7252	2,330 -	330 -	835 10		[illegible]
19	7329	2,330 -	330 -	679 78		[illegible]
16	7448	2,330 -	330 -	524 46		[illegible]
17	7529	2,330 -	330 -	369 [illegible]		1630 86
21	7597	2,330 -	330 -	[illegible]		1776 18
[illegible]	7757	2,330 -	330 -	58 [illegible]	[illegible]	[illegible]
20	8132	2,330 -	330 -	2037 [illegible]		[illegible]
22	8250	2,330 -	330 -	1359 6		[illegible]
20	8252	2,330 -	330 -	1359 6		[illegible]
20	8403	2,330 -	330 -	1359 6		[illegible]
20	8538	2,330 -	330 -	1359 6		[illegible]
19	8[illegible]7	2,330 -	330 -	1359 6		[illegible]
					[illegible]	
22	8[illegible]	2,330 -	330 -	291 28		1708 7
21	8[illegible]	2,330 -	330 -	291 28		1708 7
17	9017	2,330 -	330 -	291 28		1708 7
[illegible]	9088	2,330 -	330 -	291 28		1708 7
[illegible]	9[illegible]	2,330 -	330 -	291 28		1708 7
26	9[illegible]	2,330 -	330 -	291 [illegible]		1708 5
27	9[illegible]	2,330 -	330 -	[illegible]		[illegible]
8	9[illegible]	2,330 -	330 -	2000 -		
[illegible]	9[illegible]	2,330 -	330 -		[illegible]	2000 -
29	9[illegible]	2,330 -	330 -		[illegible]	2000 -
30	9706	2,330 -	330 -		330 -	2000 -
1	9899	2,330 -	330 -		330 -	2000 -
8	9995	2,330 -	330 -		330 -	2000 -
10	[illegible]	2,330 -	330 -		330 -	2000 -
9	[illegible]	2,330 -	330 -		330 -	2000 -
7	[illegible]	2,330 -	330 -		330 -	2000 -
16	370	1,165 -	165 -	1000 -		
18	[illegible]	2,330 -	330 -		330 -	2000 -
19	[illegible]	2,330 -	330 -		[illegible]	2000 -
1	702	1,165 -	165 -	1000 -		
30	712	2,330 -	330 -		[illegible]	2000 -
31	796	2,330 -	330 -		[illegible]	2000 -
18	871	2,330 -	330 -		[illegible]	2000 -
29	961	2,330 -	330 -		[illegible]	2000 -
30	1006	2,330 -	330 -	2000 -		
30	1063	2,330 -	330 -		[illegible]	2000 -
31	1173	2,330 -	330 -		[illegible]	2000 -
31	1[illegible]	2,330 -	330 -		[illegible]	2000 -
	1[illegible]	2,330 -	330 -			2000 -
					[illegible]	
31	1[illegible]	2,330 -	330 -		[illegible]	2000 -
[illegible]	[illegible]	2,330 -	330 -		[illegible]	2000 -
[illegible]	1[illegible]	2,330 -	330 -		[illegible]	2000 -
					[illegible]	
					2330 -	
					[illegible]	
					[illegible]	
		$117,665 - (1)	$16665 - (2)	$[illegible] (3)	$[illegible] (4)	$[illegible] (5)

Paid by Custer — Note #1 … Note #[illegible] (columns of payments, [illegible])

Unpd. Bal. … = $[illegible]

(4)+(5) Total Paym'ts $[illegible]

(1) Total all notes $117,665 -

Appendix II

No. 2579

In the Supreme Court of the Territory of Hawaii

Hilo Finance & Thrift Co., Ltd.,
Plaintiff-Appellee,
vs.
George B. Carey,
Defendant-Appellant,
Bank of Hawaii and Bishop National Bank of Hawaii,
Garnishees.

APPELLANT'S OPENING BRIEF.

This is an action at law in assumpsit. The action was commenced in the Circuit Court of the Third Judicial Circuit on June 3, 1939. Jurisdiction is based upon Section 81 of the Organic Act, Territory of Hawaii; Section 3643, Revised Laws of Hawaii, 1935, Par. 5, confers upon the Circuit Court Jurisdiction to hear and determine all civil cases at law. Section 3593, Revised Laws of Hawaii, 1935, confers jurisdiction on the Supreme Court to hear and determine all matters brought before it on "exceptions duly perfected from any other Court". Section 3530, Revised Laws of Hawaii, 1935, grants the right to proceed to the Supreme Court on Bills of Exceptions.

On January 12, 1944, following a trial, the Honorable Ray J. O'Brien, Judge of the Third Circuit, made and filed his Decision in writing (Record pp. 51-64). An Exception to the Decision was filed January 20, 1944 by the Defendant (Record pp. 65-73). Judgment was entered April 19, 1944 (Record pp. 74-76.) Exception to Judgment was entered by the Defendant on April 20, 1944 (Record pp. 77-78). On April 19, 1944, Judge O'Brien signed an order allowing the Defendant up to and including June 1, 1944, to present his Bill of Exceptions. Pursuant to said order a Bill of Exceptions was presented to Judge O'Brien on May 15, 1944, which Bill of Exceptions was duly allowed by Judge O'Brien and filed on June 30, 1944. Thereafter, the said Defendant deposited with the Clerk of the Supreme Court $25.00 for cost to accrue in the Supreme Court.

The jurisdictional steps set forth in Section 3530 and 3632, Revised Laws of Hawaii, 1935, have thus been taken and this Court has jurisdiction to review the Decision and Judgment of the lower Court.

B. STATEMENT OF FACTS.

Plaintiff is a corporation organized under the laws of the Territory of Hawaii, licensed as a money-lender under the Act 154, Session Laws of Hawaii, 1937 Industrial Loan Company Act (Stipulation p. 19, Transcript). The Defendant is a dealer in sewing machines, selling machines all over the Territory of

Hawaii on partial payments and having an agency of his business in Hilo. One, Hugh C. Tennent, a Certified Public Accountant and Auditor, was the auditor of both the Plaintiff and the Defendant in November of 1933 (Transcript p. 20). Tennent acted as intermediary between Plaintiff and Defendant to negotiate a financing contract by which a continuous series of loans was to be made by the financing corporation month by month to the Defendant (Transcript p. 23). The arrangement was that the Defendant was to put up as a security for his loan the assigned contracts of sale for sewing machines, originating in the Island of Hawaii, and that, as these contracts were put up as security month by month, the monthly loan would be acknowledged by a promissory note payable in 15 equal monthly payments, issued under the terms of the general contract (Transcript p. 23). The notes were either for $1,000.00 or $2,000.00 advanced to the Defendant. To this amount were added the so-called "interest deducted in advance." The note evidencing a $1,000.00 advance was made for a face value of $1,165.00 and the note evidencing a $2,000.00 advance was made for a face value of $2,330.00 (Transcript p. 24). There was a conditional agreement that there should be a rebate of interest for prompt payment made to the Defendant if all the terms of the note were met, which varied as to amount during the time this agreement was in effect. (Transcript p. 25). It was agreed as part of the original transaction that the financing arrangement between the parties could be terminated by the Defendant at any due date by the

payment of all sums then due (Transcript pp. 128-129).

Mr. Tennent, the auditor and intermediary in this transaction, was called as a witness for the Plaintiff and testified in minute detail as to the contract between the parties and, particularly, to a long hypothetical question upon the effect the contract's rate of interest upon the payment of a hypothetical thousand dollar note. The hypothetical question or situation upon which Mr. Tennent testified is this:

That if under the agreement as it existed between Plaintiff and Defendant, to wit: Defendant received \$2,000.00 on a \$2,330.00 note payable in 15 equal installments on the first of the month and thereafter on the 1st of each month executed a new similar note for which he received \$2,000.00 credit on the installments then due on preceding notes and the balance in cash, there would come a time, upon the execution of the 14 notes in series, when, not only would the installments then due not be paid by the execution of a new note, but additional cash would have to be advanced to meet the amounts due on the foregoing notes.

> "Q. He has figured out the figures here that appear that on the first month the Defendant would get \$1,000, second month he would get \$922.34, the third month \$844.68, fourth month \$767.02, fifth month \$689.36, sixth month \$611.70, seventh month \$534.04, 8th month \$456.38, 9th month \$378.72, tenth month \$301.06, 11th month \$223.40, Twelfth month \$145.74, 13th month \$68.08, nothing the 14th or nothing the 15th.

A. Except the 15th he gets the rebate coming in.

Q. That is rebate start coming in on the first note?

Mr. Cades: We would be willing to stipulate that that is mathematically correct."

Transcript page 43.

At that time on series of thousand dollar notes, there would have been advanced to the borrower in actual cash $6,942.52 (Transcript pp. 47, 48). Thereafter, no cash whatever would be advanced on account of the series of notes, but each month a new note would have to be executed to care for the installments then due and on the 15th payment, the whole amount of that installment would have to be advanced in addition to the execution of a new note plus $77.66, the amount of shortage on a new note that covered the obligation on the 14th note, a total of $242.66, which was required to maintain the balance of the loan in status quo.

Mr. Tennent testified and it was never disputed that under the circumstances related on the hypothetical question, that is, the renewal of the lump sum then due by the execution of the new note and payment of moneys which were due to keep the account in status quo, was at the interest rate of 42% per annum. Mr. Tennent testified that the actual transaction between Plaintiff and the Defendant resulted in a situation that was exactly like the hypothetical question in that a series of notes were given, repaid, as the installment became due by the issuance of succeeding notes and, finally by the maintenance of a status quo by the pay-

ment of Carey of the 42% rate of interest demanded for the continuance of the loan (Transcript p. 126).

Throughout the trial testimony was offered relative to the "rebate" offered for the prompt performance of the conditions of the loan by Mr. Carey. As to the notes upon which this action is brought, no rebates were allowed whatever. These rebates were entirely conditional upon prompt payment of the installment then due on each note and were never paid except in strict accordance with that agreement (Transcript pp. 30 and 31). And as the due date of installment on each note varied in accordance with the execution of the date of the note itself, the payments of credits secured by new note would be in accordance with the terms of some notes and not in accordance with the terms of others. A charge was made of one per cent per month for the deficiency for the period of delinquency. In 1938, Supreme Court decided the case of *Helbush v. Mitchell,* and, upon reading of that decision Mr. Carey, Defendant, decided that he was being robbed by usurious interest and refused to pay anything more on account of this contract and no rebate were offered or extended on any of the note subsequent at that time. The present action is based upon the face of the notes.

During the course of these transactions, Defendant received from Plaintiff $17,973.32. Up to December 30, 1938, when the last payment was made by the Defendant, he had paid in to the Plaintiff $26,890.12 (Exhibit 1A-40). These payments were all prior to December 30, 1938. Under the laws that existed at that time De-

fendant was entitled to credit for his loan in full payment of the principal of the loans made to him and the debt was entirely satisfied.

A tabulation of the exhibits in this case shows that the relations between the Plaintiff and the Defendant proceeded as follows:

The first series of notes continued to February 19, 1935. The date of execution of note 5840; at which time the Defendant received $58.40 in cash and was credited on back payments on the prior notes $1,941-.60. He had at this time run out of the series of notes by which he could obtain any money whatsoever. Thereafter, he paid to the Plaintiff on March 21, $1,000.00; March 27, $1,019.26; April 23, $1,397.88; April 30, $543.72; May 21, $1,000.00; May 27, $863.94, maintaining the status quo of his loans in accordance with the schedules set forth by Mr. Tennent for four months by payment of cash and at the same time paying off the installments on four notes which accrued during those months and leaving him with 11 notes on which there were unpaid installments and placing him in a position where on June 12 he could again put in a note to cover all of his installments and receive money. He then ran another series of notes until the end of the year and again he ran out of credit and paid $1,864.04 on December 31 to maintain his position and pay one installment on the notes then due. In August of 1936, he again ran out of credit, starting September 29, 1936 he executed notes each month until June of 1937. On each of the months that he executed

notes in 1937, he paid an additional $330.00 cash to maintain his balance with the company. In June of 1937, his accumulated notes caught up with him again and he began executing notes twice each month from then on and in addition to the notes he executed paying in sums of approximately $640.00 a month to July 13, 1938 when the last note was executed. It is thus apparent, that the sums paid in to the Plaintiff each month during this whole period of nearly three years, represented merely an extension of the total debt over each month. The paper transaction of executing a note upon which were credited the balances then due had merely the effect of extending the due date for 30 days, and the profit to the lender for the use of the balance that was then payable for the 30 days was the total of the cash paid in computable in the manner designated by Mr. Tennent at 42% plus per annum or approximately three and one-half percent per month.

C. QUESTIONS INVOLVED.

1. Where parties enter into a financing contract, whereby money is to be advanced over a period of time, each advance evidenced by a promissory note, but the aggregate of the loan is treated as one account and is repayable at any time by the borrower and the sum of money is required by the lender and paid by the borrower for the extension of this lump sum in excess of 42% per year, is the contract for the pay-

ment of interest void under sections 7, 8736 and 8734 Revised Laws of Hawaii 1945?

2. Where notes on their face call for the maximum rate of legal interest, with interest deducted in advance to maturity, and the notes contain an acceleration clause automatically enforcing the penalty without return of the interest deducted in advance, which may cause the entire deducted interest to be applied for the use of the borrower's money for a minor fraction of the maturity date, is the contract prima facie usurious?

3. Where notes in accordance with their terms are accelerated instantly upon default without the option of the holder and, in 1938, the payee of the note refuses all further payment and claims the application of usurious interest to the extinguishment of all balances then outstanding on the notes or loan, are the notes and the loan so extinguished as of that date that the legislature of 1939 could not revive a debt between the loaner and the borrower?

4. Where a blanket financing contract is entered into between the parties whereby sums are to be advanced under that contract and notes are to be issued evidencing such advances, and the lump sum which is due at any one particular time may be paid off by the borrower; as a condition of extension of said lump sum for a period of thirty days (30), lender makes a demand for and receives interest payments or payments for forbearance, at a rate of 24% per annum or more on the sums then due and the lender is licensed

under the Industrial Loan and Investment Law, Chapter 170, Revised Laws of Hawaii 1945 and the Licensing Laws which preceded that act, is the lender under the protection of the saving clause of the Industrial Loan and Investment Law contained in Sections 6782-W and 6782-X of Act 75,, Session Laws of 1939 as shown on page 262 of the Session Law?

5. Does the legislature of Hawaii have the power to revive a contract for the payment of money which by the terms of preceding laws had been fully satisfied and extinguished between the parties by the application of usurious interest under the terms of Section 7053 Revised Laws of Hawaii 1935 and Section 8816 Revised Laws of Hawaii 1945?

D. HOW THE QUESTIONS ARE RAISED.

All these questions are concerned with the defense of payment raised by the Answer and by the evidence. They are also raised by the Exceptions to the Decision and the Exceptions to the Judgment.

E. SPECIFICATION OF ERRORS.

1. It was error for the trial judge to fail to apply all of the payments in this transaction to the satisfaction of these notes.

2. It was error for the trial judge to fail to consider the transaction as a whole and to compute the rate of interest which was charged on the basis of the

individual notes rather than the profits received from the whole transaction.

3. It was error for the trial judge not to hold that the transaction was attainted with usury from its inception and that the whole of the notes had been satisfied by the application of the payments including usurious interest under the terms of Section 7053 of the Revised Laws of Hawaii 1935.

4. It was error for the trial judge to rule that the amendment to the Industrial Loan Act of 1939 revived a right of action which under the preceding law had been fully satisfied and cancelled by the exercise of Defendant's right to apply all the preceding payments to the satisfaction of these notes in 1938, when Carey ceased to pay anything on these notes and refused to pay further under the Decision in the Helbush case.

5. It was error for the trial judge to hold that the 1939 amendment to the Industrial Loan Act applied to the facts in this case, in that, it was shown that by the terms of the contract under which these notes were issued, the actual profit to the lender exceeded one per cent per month as a straight interest on the balance owing at the time of the collection of this profit.

6. It was error for the trial judge to hold that the contract for the payment of the interest, which was in violation of criminal statutes, was not void but merely voidable, and that the right of the maker of these notes to plead usury in defense of a transaction fully paid and satisfied in 1938 under the then statute,

could be revived by the legislature to create a new and valid contract for the payment of money.

7. It was error for the trial judge to fail to give judgment for the Defendant on his cross-complaint for the excess monies paid by the borrower to the lender under a void contract.

8. It was error for the trial judge to rule in the manner set forth in the Bill of Exceptions on the questions raised by that Bill.

F. ARGUMENT.

1. WHERE PARTIES ENTER INTO A FINANCING CONTRACT, WHEREBY MONEY IS TO BE ADVANCED OVER A PERIOD OF TIME, EACH ADVANCE EVIDENCED BY A PROMISSORY NOTE, BUT THE AGGREGATE OF THE LOAN IS TREATED AS ONE ACCOUNT AND IS REPAYABLE AT ANY TIME BY THE BORROWER AND THE SUM OF MONEY IS REQUIRED BY THE LENDER AND PAID BY THE BORROWER FOR THE EXTENSION OF THIS LUMP SUM IN EXCESS OF 42% PER YEAR, IS THE CONTRACT FOR THE PAYMENT OF INTEREST VOID UNDER SECTIONS 7, 8736 AND 8734, REVISED LAWS OF HAWAII 1945?

At all times covered by the transactions set forth in this action, Plaintiff has been a licensed money-lender under the provisions of the Laws of Hawaii; first, as a licensed money-lender; then, the licensee under the Industrial Loan Act and now under the law of 1939. Uniformly, all of the licensing Acts called for a one per cent per month limitation on the interest which might be charged by a licensee, and provided criminal penalties for the licensee who exceed the rate provided. In 1937, the general usury statute making criminal the charging of excess interest (Section 7055

Revised Laws of Hawaii 1935) was amended to reduce the legal rate of interest that could be charged in the Territory to one per cent, under criminal penalties.

> "Since 1905, when the first criminal usury statute was enacted, the taking of interest at a rate greater than two per cent per month has been prohibited and is punishable by fine and imprisonment. (§ 7055.) By Act 222 (D-150), effective May 15, 1937, amending Section 7055, the two per cent maximum was changed to one per cent."
>
> 36 *Hawaii* 108.

> "*Devices to Conceal Usury*—The cupidity of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence, and if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings. Every species of contrivance in the modification of any loan or contract,

for the purpose of evading the statute, being cases within the mischief, are also within the remedy. Usury is a moral taint wherever it exists, and no subterfuge shall be permitted to conceal it from the eye of the law; this is the substance of all the cases, and they only vary as they follow the detours through which they have had to pursue the money lender. Though the principle stated above may be extracted from all the cases, yet as each depends on its own circumstances, and those circumstances are almost infinitely varied, it is not surprising if there should be some seeming conflict in the application of the rule by different judges. Different minds allow a different degree of weight to the same circumstances. A distinction has been drawn between cases wherein a transaction is given a certain form to cover usury and wherein it is given that form to escape usury. In the latter instance, it is insisted, the transaction is not usurious, as parties have a perfect right to deal with each other with the usury laws before their eyes, and so to shape the transaction as to avoid the condemnation of those laws."

27 *R.C.L.* p. 211, par. 12.

"*Continuous dealing as single transaction.* A contract for continuous dealing consisting of advancements made on such security as is offered from time to time is one continuous transaction of lending or advancing money secured by successive pledges of assigned paper and not a separate transaction as to each note, even though the pledgor has the right to take up or replace any note separately."

66 *C. J.* 173, par. 61.

"*Contracts Shown to Be Usurious Construed Strongly Against Lender.* Since the penalties of

the usury laws are all directed against the lender, and intended for the protection of the borrower, contracts shown to be usurious are construed strongly against the lender."

66 *C. J.* 173, par. 62.

The arrangement for financing Mr. Carey's business was made by one, Hugh Copper Tennent, who, at the time, was the auditor for Mr. Carey's business and also the auditor of the business of the Plaintiff herein. (See page 20 of the Transcript.)

"Q. Have you acted as, all during the course of this account as auditor for both companies?

A. Right up to 1939 I have acted as auditor for both parties.

Q. Will you state to the court what the arrangement was for the lending of money?

A. The arrangement was that Mr. Carey should borrow a subsequent sum a month with interest deducted which would give him the cash that he needed to finance his business in Hilo."

Transcript page 23.

By this contract, as shown by the testimony, collateral in the form of partial payment sewing machine contracts, was deposited as a mass security for all the transactions. As these sewing machine contracts were paid off, substitution was made by other contracts. All of the collateral being equal security for any part of the whole loan or transaction. There can be no question that this is a loan transaction, as distinguished from the case of Commercial Security Company v. Holcombe, 262 Federal Reporter 657, in which case the transactions, varying a little from the present,

were held to be loans, and it was held that the entire transaction was a single contract, to be considered as a whole in dealing with the question of usury, 262 Federal Reporter 663. The same question arises in Dorothy v. Commonwealth Commercial Company, L. R. A., 1917-E in which the defense of usury is applied to a series of transactions, all interconnected by one agreement to finance, in which the Court says:

> "In Cobe v. Guyer, 237 Ill. 568, 86 N. E. 1088, we said: 'So long as any part of the original debt remains unpaid the debtor may insist upon the deduction of the usury (Payne v. Newcomb, 100 Ill. 611, 39 Am. Rep. 69; Jenkins v. International Bank, 97 Ill. 568; House v. Davis, 60 Ill. 367); and only the balance of the principal remaining after the application on the principal of all payments, whether of principal or interest, can be recovered (Harris v. Bressler, 119 Ill. 467, 10 N. E. 188). No form which can be given to a contract, no device by which a new form is given to an old transaction tainted with usury, and no mere substitution of securities, will avail to cut off the defense of usury. Hunter v. Hatch, 45 Ill. 178; Nickerson v. Babcock, 23 Ill. 561.' "
> *L. R. A.,* 1917-E, page 1121.

As the present transaction was conducted the installments due were not by the execution of new notes, which, when the series reached a total of 13 notes, brought nothing to the maker, and with the 14th and 15th note required the payment of additional cash to extend the loan an additional 30 days. This additional cash for the 30 days extension of the loan was the profit of the lender on the amount then due. If the

interest charged was usurious, the amount due at any time, under the law, was the base cash total received by the borrower, and the percentage of profit on the transaction is the ratio of the charge for extension to the amount which would legally satisfy the obligation.

"Q. The next question and answer: 'The Hilo Finance & Thrift Company agreed to lend $67,000 over a period of time against contracts which were contracted for on the Island of Hawaii.' Now did you make that statement or not?

A. It is in the transcript. I imagine that is what I said.

Q. And wasn't that the agreement?

A. The agreement was to borrow monthly certain sums. The limit of the outstanding balances was determined by the first agreement. Now, if they reached . . . I can't put my hand on . . .

Q. Well, you stated here they agreed to lend this amount, is that true or is it?

A. They agreed to lend $1165 a month providing he put up sufficient collateral for recovery.

Q. Was there any agreement by the Hilo Finance & Thrift Company to lend $67,000 over a period of time against contracts which were contracted on the Island of Hawaii?

A. I think that is putting a wrong connection on it. These loans went on for month after month amounting to $67,000. I assume . . . I haven't the figures before me but that looks like the right figure.

Q. Well, you certainly wouldn't state under oath, Mr. Tennent, that they agreed to loan this sum if that wasn't true?

Mr. Cades: I object, he can correct it, ask him and he can answer it.

The Court: Yes, that is right.

Q. Well, did you make this statement?

A. I assume if the statement is there.

Q. Lets read it then right there. (Giving the witness the transcript.)

A. Mr. Carey presented a budget which provided for borrowing so much every month and provided for repayment. Now, the total amount of the borrowings that appeared on the budget would not be that amount. That is, he would borrow monthly that amount or approximate. That is a round figure and not that I had any figures in front of me to state. The figure may be over $10,000 and so on. The arrangement was to borrow so much a month and to pay so much a month but when I stated here that the amount under the first arrangement was that he wouldn't be indebted to that company in any month over a certain amount which Mr. Carey had collateral put up."

Transcript pages 36-37.

"Q. Would a series of computations on a note for $1165 in which the payments run out in 13 payments, on the 14th note?

A. On the 14th note.

Q. Thereafter the man got no more money for any extensions that he borrowed?

A. Yes, he continued therein on that basis.

Q. Now, in the actual transaction with Mr. Carey, was there a time in this general loan agreement when that situation in fact existed that he had borrowed so much money on notes that he could no longer borrow on the same kind of notes without putting in additional money or repaying some of those notes?

A. I think you will find that once or twice that condition went along.

Q. For several months or year or more?

A. Three or fours months I imagine.

Q. And that at the end of that period or at the time when this last note was due and Mr. Carey had to borrow this money, as you say he did, he could have wiped out the entire borrowing by paying off all installments that were then due or that were represented on the note, could he not?

A. I don't quite understand the question. You mean he could have wiped out the $6942.

Q. If he brought that into the office yes, plus the interest that had been charged on the note into the office, he could have wiped out the entire account, could he not?

A. Yes, of course if he brought the money in, sufficient money in to pay it."

Transcript pages 126-127.

Now as to the manner that this agreement was carried out, testimony of Mr. Tennent beginning on page 38 which reads as follows:

"Q. And you know, do you not that in the commencement of the borrowing from the Hilo Finance & Thrift Company that a note for $2330 was executed of which $2000 was turned over to Mr. Carey, $330 was retained as pre-paid interest. You know that, do you not?

A. As interest deductible in advance on $2330.

Q. Call it what you will. And then the succeeding notes were used, were they not, first they deducted the interest in advance, second, they

paid the first installment due on the first note, that is the second note."

*　　*　　*　　*　　*　　*　　*

"Q. And then the third note, the same deduction of interest was made and there was another deduction of two installments that is one of them due on the first note and then one due on the second note. They were applied to those two notes, is that correct?

A. That was not the universal case but that is the frequent case.

Q. And you say that is not universal. That is, there was notes was there not thereafter which the whole amount of cash was turned over to Carey?

A. Yes.

Q. That is what you mean by the exceptions?

A. Mr. Carey wanted additional money he asked for all the cash. On occasion when Mr. Carey had funds he paid the notes that were due.

Q. And now, Mr. Tennent, there was a period where there were fifteen of these $2330 notes outstanding?

A. Yes.

Q. Where a new note would be executed and the entire amount of that note plus $330 in cash which was paid by Mr. Carey to the Plaintiff which were used to meet the installments due on the 15 prior notes?

A. On the level $2330 which is usually the note after deducting interest, the balance in many cases was applied on other notes.

Q. And if there was 15 notes outstanding would payment on each note, each month was $155.32 and 15 times that equals $2330?

A. Yes, with a few cents difference.

Q. So that when 15 notes were outstanding and monthly installments were due, the execution of a new note of like amount because of the deduction of $330 interest paid in advance was $330 short of the amount needed to meet those installments?

A. Yes."

*　　*　　*　　*　　*　　*　　*

"Q. He has figured out the figures here that appear, that on the first month the defendant would get $1000, second month he would get $922.34, the third month $844.68, fourth month $767.02, fifth month $689.36, sixth month $611.70, seventh month $534.04, 8th month $456.38, 9th month $378.72, tenth month $301.06; 11th month $223.40, twelfth month $145.74, 13th month $68.08, nothing the 14th or nothing the 15th.

A. Except the 15th he gets the rebate coming in.

Q. That is rebate start coming in on the first note?

Mr. Cades. We would be willing to stipulate that that is mathematically correct.

Q. All right, now if he doesn't pay these notes on their due date then he isn't entitled to the rebate, is he?

A. According to the practice done here in Hilo, which is not too strictly interpreted but under the contract he was not entitled."

Transcript pages 38-39-34.

Thereafter, Mr. Tennent computed in Court:

> "Q. Showing a total of the amount which would be received under a series of notes like this one would be $6,942.52?
>
> A. Yes, sir."
>
> Transcript page 44.

Mr. Tennent testified that the complaint on the question of interest and how interest could be computed; he testified that at the end of 13 months on a series of notes, where each note was used to pay the installments due on preceding notes, and the amount of interest was that charged in the notes now in question, the borrower would receive nothing. Thereafter, if he wished to keep his account fresh he would have to renew by putting in another note and paying the installment on the note then due, that on the 13th note the borrower would receive $68.08. It is easily understandable when we say that $165.00 of prepaid interest covers two installments in the notes so that when all but two of the notes had been paid, there was one-half of the prepaid interest to be paid to renew the 14th note and when the 15th note became due there were two installments to be paid, and thereafter, each month to renew and keep the obligation stable the whole of the prepaid interest for the 14th and 15th months installments had to be paid in cash in addition to the execution of a similar note. On page 64, Mr. Tennent shows how when this situation arrives the borrower will have the use of the principal sum of money advanced to him, and, for the time that he had the use of that money, he would have paid 41%, which arrives within a fraction of a

per cent of the figure by computing the whole amount borrowed and received by the borrower, $6,942.52 and determining the amount then necessary to carry that amount forward one month; which figures out approximately 42%. Approaching the same problem by methods of his own, Mr. Tennent arrived at a result of 34% (page 53 of the trans.), (34% on page 51 of the trans.), 28.5% on page 45 of the trans.), which is the lowest figure that Mr. Tennent could supply in any way that these loans were being paid for. Previous to that, without any figures, he testified that the rate was less than 24% slightly. Thereafter, he told Mr. Carey, when he was acting as Mr. Carey's auditor, that he was paying 16% for his loan if Mr. Carey took advantage of the entire discounts or rebates to be allowed him.

At no time in his testimony (and I might say, the entire case of the Plaintiff rests on Mr. Tennent) was there any pretense that at any time that it was the intention of the lender to abide by the one per cent rate provided by law. The Trial Judge found that the rate computed strictly on the notes themselves was slightly over 24%.

This case differs from Carey v. Discount Corporation, 36 Hawaii 107, in that the usury law violation by the lender in this case was in violation of the criminal statute from the start. There never was a time when the Plaintiff in this case, as a licensed money lender, was authorized by law to charge more than one per cent a month. When he was licensed he put himself under the provisions of the Money-

lender's Act which provided criminal penalties for charging in excess of that amount. Plaintiff in this case does not contend for a moment that the interest rate charged on his loan had been less than 23%; Mr. Tennent said that it is slightly below 24%. He told Carey that when Carey got that third discount on his interest, his effective rate was 17% which makes 24% plus the actual rate charged when the computation was made on the face of the note and not made upon the basis of payments for monthly renewal.

It is obvious that the difference in the rate of interest consists in the fact that the monthly renewal not only prepaid a new note at the rate of 24% but also compounded the interest on the other notes which accounts for the rate of 41 to 42 per cent at which the charge actually figures out.

Section 7 of the Revised Laws of Hawaii, says that which is prohibited is void. In adjudicating the Carey v. Discount case, in 36 Hawaii at page 126, the Court distinguishes that case from cases in which the criminal usury statute or a criminal statute is plead as a reason for declaring the payment on the contract for the payment of interest void.

The contract which in inception is void, illegal and contrary to public policy is distinguishable from the contract on which the borrower has a *defense* of usury which *defense* could be taken from him. If the contract to pay interest was void, there can be no power in the legislature which could at any time thereafter give it validity.

2. WHERE NOTES ON THEIR FACE CALL FOR THE MAXIMUM RATE OF LEGAL INTEREST, WITH INTEREST DEDUCTED IN ADVANCE TO MATURITY, AND THE NOTES CONTAIN AN ACCELERATION CLAUSE AUTOMATICALLY ENFORCING THE PENALTY WITHOUT RETURN OF THE INTEREST DEDUCTED IN ADVANCE, WHICH MAY CAUSE THE ENTIRE DEDUCTED INTERTEST TO BE APPLIED FOR THE USE OF THE BORROWER'S MONEY FOR A MINOR FRACTION OF THE MATURITY DATE, IS THE CONTRACT PRIMA FACIE USURIOUS?

The contracts shown to be usurious are construed most strongly against the lender.

> "*Contracts Shown to Be Usurious Construed Strongly Against Lender.* Since the penalties of the usury laws are all directed against the lender, and intended for the protection of the borrower, contracts shown to be usurious are construed strongly against the lender.
>
> *As of What Time Character of Contract Determined.* The character of a contract with respect to usury is determined as of the time it is made. To be usurious the contract must be so in the beginning; if it is then legal it cannot be rendered usurious by subsequent transactions. This rule of construction finds its most frequent application in those numerous cases in which it is held that, when a person agrees to pay a sum of money by a certain date, and thereafter more than the legal rate of interest if the debt be not punctually paid, such an agreement is not usurious, even though excessive payments actually made under the agreement may be usurious."
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> 66 *C. J.*, pages 173-174, paragraphs 62 and 63.

In *Helbush v. Mitchell,* 34 Hawaii at page 643, the Court said "Statutory licensees possess only such

powers as are expressly conferred or necessarily implied."

The notes in this case are peculiar; the acceleration clause is not at the option of the holder, but the note becomes absolutely due and payable upon default of any of the payments without the exercise of any discretion at all upon the part of any person involved.

> "*Necessity; General Rules for Determination.*—To constitute usury, it is of course essential that an excess of the legal maximum be exacted in consideration of the loan or forbearance. By this is meant an excess of the maximum prescribed by statute. Though there is authority to the contrary, it does not seem requisite that an excess be payable in any event. On the contrary a contract is usurious when there is any contingency by which the lender may get more than the lawful rate of interest, whether it is so apparent that it becomes the duty of the Court so to declare, or whether it is a case in which it is necessary that the jury should find the facts. Usury, it is considered, does not depend on the question whether the lender actually gets more than the legal rate of interest or not; but on whether there was a purpose in his mind to make more than legal interest for the use of money, and whether, by the terms of the transaction, and the means used to effect the loan, he may by its enforcement be enabled to get more than the legal rate. Consonant with this doctrine it has been held that a contract for the loan of money at the legal rate of interest, but in case the debtor's business succeeds the rate to be paid

> by him to be much in excess of that rate, is a usurious contract. Usury may exist even though interest is paid not in money but by services or in commodities. So where a slave was pledged as security for a loan, the lender to have the use of the slave for interest, the contract was held usurious, the value of the slave's services being in excess of legal interest on the sum advanced. The extent of the advantage, or the amount of the surplus in excess of legal interest is wholly inconsequential on the question of usury. Furthermore, to constitute usury it is not necessary that the maximum laid down in the general statute against usury be exceeded. It suffices if more than the maximum allowable under a special statute applicable to the case be exacted. When a bank reserves greater interest than its charter allows, the usury laws apply to the contract, although the rate does not exceed the rate prescribed thereby."
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> 27 *R.C.L.* page 223, Paragraph 24.

The notes themselves include the interest for the full term deducted in advance and the claim in this action is for the whole of the balance due upon the face value of the note with the claim that they were defaulted some time prior to the due date. In other words, the default was charged in 1938, at which time a certain amount of the interest which had been deducted in advance, if it were legal, had been earned. The claim of the whole balance as existed at the time of the default is the claim for not only the earned interest which was the actual extreme legal limit under the law, but also was the claim for the unearned

interest which makes the profit to the lender very much in excess of the legal profit which might be exacted by a licensed money lender.

That this effect was anticipated by the lender cannot be doubted. This is especially true because the property pledged for the whole series of notes or the lending contract secured each of the notes, so that, if a default on the last payment of one of these notes was entered, the lender was authorized to sell out the whole of the security of all the notes, thus defaulting the rest of the notes and causing the maturity date to be accelerated.

These notes must be distinguished from those in which the power to declare a forfeiture is optional with the holder. When that is the case, the enforcement of the penalty is optional with the holder. At the inception it may be said the holder had no intention of enforcing a harsh penalty, and the harsh penalty was not absolutely provided in the note hence the notes were not usurious. Here, however, is just the reverses of that case. These notes became due without any option on the part of anybody on the default of the slightest of the requirements of the instrument itself.

The intention of the legislature that a loan company should not be allowed to profit to the extent of usury by an acceleration of the loan is shown in the Industrial Loan and Investment Law, Session Laws of Hawaii 1939, page 258, Section 6, which reads as follows:

"On a contract which has been discounted or on which interest has been collected in advance, and which is then paid or refinanced or on which judgment is then obtained before maturity, the industrial loan company involved shall refund to the borrower on account of unearned discount or interest an amount computed, on that portion of the principal amount which has not yet matured, at the same rate of discount or interest as was charged, at the time the contract was made, for the term of such contract remaining after the date of such payment or after the date of such judgment; provided, that no refund less than 25 cents need be made. Each company shall permit any borrower from it to pay partially or wholly any contract or installment on a contract prior to the due date, if such contract has been in effect for a period of at least three months."

Session Laws of Hawaii, 1939, Section 6, p. 258.

It is thus evident that on all of these notes which became due by acceleration on the day which the complaint says there was a failure to pay an installment, it was the duty of the loan company to refund or to give credit for the unused portion of the interest. To claim the whole unearned prepaid interest and to begin an action based upon that claim, constitutes usury, putting the loan company wholly without the benefit of any protection that the amendment of 1939 might have given them, and this result is obvious from the note itself and the peculiar wording of the acceleration clause.

When there is a series of 15 notes, payable in 15 equal installments, one-half of the installments have

been paid and one-half remains unpaid. This situation remains as long as the oldest note is renewed by the execution of a new note. It is obvious that the acceleration of due date in that condition finds one-half of the interest deducted in advance unearned. When an attempt is made to collect the face of the note at that time the rate of interest for the period of use of the money is doubled. If these notes require a normal 24% interest if paid at maturity, the rate is 48% at the acceleration date. The attempt to collect this unearned interest is in disregard of all usury laws and in violation of the amendment of 1939 to the Industrial Loan Act.

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3. WHERE NOTES IN ACCORDANCE WITH THEIR TERMS ARE ACCELERATED INSTANTLY UPON DEFAULT WITHOUT THE OPTION OF THE HOLDER AND, IN 1938, THE PAYEE OF THE NOTE REFUSES ALL FURTHER PAYMENT AND CLAIMS THE APPLICATION OF USURIOUS INTEREST TO THE EXTINGUISHMENT OF ALL BALANCES THEN OUTSTANDING ON THE NOTES OR LOAN, ARE THE NOTES AND THE LOAN SO EXTINGUISHED AS OF THAT DATE THAT THE LEGISLATURE OF 1939 COULD NOT REVIVE A DEBT BETWEEN THE LOANER AND THE BORROWER?

> "A vested right may also be defined as the power to perform certain actions or possess certain things lawfully and is substantially a property right. When a right has arisen upon a contract or transaction in the nature of a contract, authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, it has become vested and the repeal of the statute does not affect it or an action for its enforcement."

"*The repeal of a law* which is, in its nature, a contract, cannot divest vested rights which have been established under that statute. *Poindexter v. Greenhow,* 114 U. S. 270, 29 L. ed. 185, 5 S. Ct. 903, 962."

11 American Jurisprudence, page 1199.

"* * * A repeal or amendment of a statute, however, cannot have the effect of extinguishing vested rights which have been acquired under the former law."

11 Am. Jur., page 1201.

"* * * Illustrations abound of defenses which are clearly substantial and of which a party cannot be deprived. A man who has a demand which has been actually satisfied clearly cannot be required to meet it again by having it revived against him * * *"

11 Am. Jur., page 1207.

This case is to be distinguished from cases in which there is an existing obligation to which a defense of usury might be heard. Section 7053 provided that the right of action might be extinguished by the application of usurious interest to the principal, where it has been paid. The mere existence of the notes, which are evidences of this debt and not the contract debt itself, does not keep alive a cause of action which once has been extinguished. It must be remembered that the Defendant in this action exercised his right to extinguish these obligations by his affirmative action in refusing to pay further after having paid in sufficient to clear the money advanced by the applica-

tion of his payments. The plea in defense is a plea of payment, not a plea of usury in bar of collection. Hence, the satisfaction of this obligation by the application of the payments was sufficient to give Carey a vested right to the satisfaction of his obligation.

The right of the legislature to repeal or change the statute in regard to usury is similar to the right of the legislature to change or extend the statute of limitations. There is no question but that the statute of limitations may be extended as to an existing obligation so also the statute might be extended or changed as to the defense of usury, limited, however, to those cases where there was a subsisting obligation. Where the effect of the legislation is to create out of the blue sky an obligation which did not exist or which has been fully satisfied, the power does not exist in the legislature.

> "When the period prescribed by the statute of limitations has once run, so as to cut off the remedy which one might have had for the recovery of property in the possession of another, the title to the property, irrespective of the original right, is regarded in law as vested in the possessor, who is entitled to the same protection in respect to it which the owner is entitled to in other cases. A subsequent repeal of the limitation law could not be given a retroactive effect, so as to disturb this title. It is vested as completely and perfectly and is as safe from legislative interference as it would have been if it had been perfected in the owner by grant or any species of assurance. Cooley, Const. Lim. 365."

"Retroactive declaratory statutes will not be allowed to affect vested rights. Lambertson v. Hogan, 2 Pa. 22; Haley v. Philadelphia, 68 Pa. 45; 8 Am. Rep. 153; McLeod v. Burroughs, 9 Ga. 213.

A statute which, operating upon facts existing at the time of its passage, attempts to impose upon one person a debt or duty to another, where there was no right and no obligation in existence before the passage of the act, is in violation of the constitutional prohibitions. Ryan v. State, Eller, 5 Neb. 276; Towle v. Eastern Railroad, 18 N. H. 547, 47 Am. Dec. 153."

United States Supreme Court Reports, Law Ed., 14-42, p. 96.

"It is well settled by the decisions of this Court that 'The remedy subsisting in a State, when and where the contract is made and is to be performed, is a part of its obligation, and any subsequent law of the State which so affects that remedy as substantially to impair and lessen the value of the contract is forbidden by the Constitution, and is therefore void.' *Edwards v. Kearzey,* 96 U. S. 595, 607 (24:793, 798).

It had been previously said upon a review of the decisions of the court, in *Von Hoffman v. Quincy,* 71 U. S. 4 Wall. 535, 553 (18:403, 409): 'It is competent for the States to change the form of the remedy, or to modify it otherwise as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy which are to be deemed legitimate and those which, under the form of

modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances. Whenever the result last mentioned is produced the Act is within the prohibition of the Constitution, and to that extent void'.

In *Bronson v. Kinzie,* 42 U. S. 1 How. 311 (11: 143), *Chief Justice Taney* said: 'It is difficult, perhaps, to draw a line that would be applicable in all cases between legitimate alterations of the remedy and provisions which, in the form of remedy, impair the right. But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing.'

In *Louisiana v. New Orleans,* 492 U. S. 203, 206 (26:132, 133), *Mr. Justice Field,* in the opinion of the court said: 'The obligation of a contract, in the constitutional sense, is the means provided by law by which it can be enforced—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened.' "

United States Supreme Court Reports, Law Ed. 29-30, p. 1165.

4. WHERE A BLANKET FINANCING CONTRACT IS ENTERED INTO BETWEEN THE PARTIES WHEREBY SUMS ARE TO BE ADVANCED UNDER THAT CONTRACT AND NOTES ARE TO BE ISSUED EVIDENCING SUCH ADVANCES, AND THE LUMP SUM WHICH IS DUE AT ANY ONE PARTICULAR TIME MAY BE PAID OFF BY THE BORROWER; AS A CONDITION OF EXTENSION OF SAID LUMP SUM FOR A PERIOD OF THIRTY (30) DAYS, LENDER MAKES A DEMAND FOR AND RECEIVES INTEREST PAYMENTS OR PAYMENTS FOR FORBEARANCE, AT A RATE OF 42% PER ANNUM OR MORE ON THE SUMS THEN DUE AND THE LENDER IS LICENSED UNDER THE INDUSTRIAL LOAN AND INVESTMENT LAW, CHAPTER 170, REVISED LAWS OF HAWAII 1945 AND THE LICENSING LAWS WHICH PRECEDED THAT ACT, IS THE LENDER UNDER THE PROTECTION OF THE SAVING CLAUSE OF THE INDUSTRIAL LOAN AND INVESTMENT LAW CONTAINED IN SECTIONS 6782-W AND 6782-X OF ACT 75, SESSION LAWS OF 1939 AS SHOWN ON PAGE 262 OF THE SESSION LAW?

The situation in this action is that contemplated in Section 7 of Section 6782-L, Session Laws of 1939 as shown on page 258. In extending a loan the interest referred to is one per cent deductible in advance for the period of the extension, that is slightly in excess of one per cent a month.

> "On a contract which has been discounted or on which interest has been collected in advance, and which is then paid or refinanced or on which judgment is then obtained before maturity, the industrial loan company involved shall refund to the borrower on account of unearned discount or interest an amount computed, on that portion of the principal amount which has not yet matured, at the same rate of discount or interest as was charged, at the time the contract was made, for the term of such contract remaining after the date of such payment or after the date of such judgment; provided, that no refund less than 25

cents need be made. Each company shall permit any borrower from it to pay partially or wholly any contract or installment on a contract prior to the due date, if such contract has been in effect for a period of at least three months."

Section 7, Session Laws of 1939, page 258.

"Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by Chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of the making of such note or other contract, if such note or contract provides for, and there has been collected thereon by such payee or obligee or the holder thereof, no greater rate of amount of interest or other charges or both, than those that would have been permitted under this Act if it had been in force when such note or contract was made."

Section 2 of 6782-X p. 262, Session Laws of Hawaii, 1939.

It is apparent that the protection given by the Session Laws of 1939, if any protection was given at all by the legislature, does not extend to anyone who,

in the course of his business, exacted more than one per cent per month for the extension of the loan, regardless of the means of evasion of the law attempted by the lender. All of these notes are extension notes, extending the loan in due process by the payments of the reserved interest for the period of a month for which the extension should apply. According to Tennent, the cheapest rate which can be figured on these loans was 14.1%. That is the rate which he estimates Carey could have this loan, if all of the rebates were allowed and there had been prompt performance by Carey. He told Carey under the same circumstances the interest rate was 16%; either 14 or 16 per cent is more than the one per cent allowed by the statute, even deductible in advance, and without these so-called rebates Tennent said that the rate was just below 24%. The Court finds that the rate was just above 24% in accordance with the terms of the note. In accordance with the process of renewal, Tennent says, the interest rate is 28%, 34% or 42%, and in consideration of the fact that the notes were defaulted with 50% of the interest unearned Tennent's rate becomes 48%, 68%, and 94%. Session Laws of Hawaii 1939 provides a saving clause which permits people who loaned money under rates which are now permissible to purge their loan of usury. Under these circumstances, where there was no attempt at all to stay within the usury limits, and where the actual charge was way in excess of any rate permitted by the Sessions Laws of 1939, it is far beyond the intention of the legislature to provide relief.

The power of the legislature in changing the usury law, and in extending the period of the statute of limitations, is always and in all decisions qualified to the application of the amendment to existing contract.

> "Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of such a statute, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, *as long as it remains in fieri, and not realized, by having passed into a completed transaction,* may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract."
> 6 R.C.L. 351.

The contract in this case was the general contract to loan money, that contract has been fully satisfied under the terms of the existing law. It is to be distinguished from the *"evidence"* of the contract which still is in existence, that "evidence" of the contract will exist as long as ink can be read on paper and the papers themselves are in existence. A promissory note for a preexisting debt is mere evidence of that debt. It neither extinguishes the pre-existing debt, nor does it add to its binding effect. The existence of these pieces of paper does not make this an existing contract. The contract itself was extinguished in 1938 when Carey acting upon the ruling of this Honorable

Court in the case of Helbush v. Mitchell, determined that he would no longer pay, and refused to regard himself as the debtor of the Plaintiff in this case. As a matter no longer in existence as a contract or obligation, the constitutionality of the 1939 Session Laws regarding "existing" contracts is not in question. In the case before the Court, the whole question is, whether or not contracts which have been wholly extinguished under the provisions of the law as it existed prior to 1939 may be reimposed by the Territorial Legislature upon the debtors.

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5. DOES THE LEGISLATURE OF HAWAII HAVE THE POWER TO REVIVE A CONTRACT FOR THE PAYMENT OF MONEY WHICH BY THE TERMS OF PRECEDING LAWS HAD BEEN FULLY SATISFIED AND EXTINGUISHED BETWEEN THE PARTIES BY THE APPLICATION OF USURIOUS INTEREST UNDER THE TERMS OF SECTION 7053, REVISED LAWS OF HAWAII 1935, AND SECTION 8816, REVISED LAWS OF HAWAII 1945?

The principles involved in this question have all been discussed in the discussion of preceding questions of law, and the argument on this question is based upon the argument set forth above without repetition.

G. CONCLUSION.

We have here an unconscionable loan made with the full intent that the one per cent limitation upon money lenders should be evaded. Usurious contracts are interpreted on the terms contained in the documents relating to their enforcement.

The amount of interest charged is that which a strict enforcement of the contract by the usury would bring him as a profit. So-called rebates depending on whim or the charity in the heart of the loan shark do not purge the usurious contract of usury. This is particualrly so where, as in the present case, there is an action in law to collect the full amount claimed to be due under the usurious contract.

There was a process contained in the repealing act by which the usurer might have attempted to purge himself, but which has not been used. Carey has paid the whole of the money advanced to him; he has also paid a sum in excess of $6,000.00 on interest for that loan. He is entitled to rest upon the decision in Helbush v. Mitchell that he could apply all of his payments to the satisfaction of his legal and moral obligation to return the principal. He never was required to go into Court to secure the application of the payments under the terms of that Decision and the law upon which it was based. His debt has been paid and he is entitled to a clearance from this Court.

Dated: Honolulu, T. H.,
April 30, 1945.

Respectfully submitted,

George B. Carey,
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By—Cass & Silver,
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By...

Phil Cass.